82-1186

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED, AND MCGREGOR, SWIRE AIR SERVICES LIMITED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the courts of the United States may abrogate a provision of a treaty which is both constitutionally sound and capable of enforcement?

2. Whether the court of appeals erroneously failed to exercise its constitutional responsibility to construe the Warsaw Convention's limitation of liability provisions to effectuate the intent of the signatory States in light of changed circumstances?

3. What is the proper conversion factor for the gold franc provisions of the Warsaw Convention in view of the unequivocal intent of the Convention's signatories to fix air carrier limits of liability at a predictable, stable and definite level?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitution, Statutes, Treaties, and Rules:

Legislative Materials

PAGE

Books, Articles and Other Materials:

No.

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Petitioner, Trans World Airlines, Inc. ("TWA")[1] requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this action on September 28, 1982, which affirmed a final judgment of the United States District Court for the Southern District of New York. Specifically, TWA seeks review of that portion of the lower court's decision declaring that certain provisions of a treaty adhered to by the United States are prospectively unenforceable in United States courts.

1. Pursuant to Rule 28.1 of this Court, petitioner states that TWA is a wholly owned subsidiary of Trans World Corporation.

OPINIONS BELOW

The opinion of the court of appeals, reported at 690 F.2d 303 (2d Cir. 1982), is reprinted in the Appendix hereto at A-1.[2] The opinion of the district court, reported at 525 F. Supp. 1288 (S.D.N.Y. 1981), is reprinted at A-26.

JURISDICTION

Respondents, Franklin Mint Corporation, Franklin Mint Limited, and McGregor, Swire Air Services Limited (hereinafter collectively "Franklin Mint"), brought this action in the United States District Court for the Southern District of New York, alleging both federal question and diversity jurisdiction. Franklin Mint sought recovery for the loss of air cargo shipped on a TWA international flight and TWA moved for partial summary judgment to limit its liability under Article 22 of the Warsaw Convention.[3] The district court granted TWA's motion and entered final judgment limiting TWA's liability in accordance with the Convention. Although the Court of Appeals for the Second Circuit affirmed the district court's decision, it declared that sixty days from the issuance of its mandate "the Convention's limits on liability for loss of cargo [will be] unenforceable in United States Courts." A-19, 690 F.2d at 311.[4]

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1), which permits "any party" to a case in the court of appeals to apply for a writ of certiorari. It is clear that Section 1254(1)'s "reference to 'any party' is broad enough to encompass

2. References in the form "A" refer to pages of the Appendix to this petition.

3. All references to the "Warsaw Convention" or the "Convention" are to the Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. §1502 note (1970).

4. The court of appeals denied TWA's petition for rehearing in banc on December 1, 1982 (A-24), and on December 17, 1982, stayed the issuance of its mandate subject to the filing of a petition for certiorari in this Court within thirty days of the entry of its stay order (A-21). This petition was filed within thirty days from that date.

the successful or winning party before the court of appeals." R. Stern & E. Gressman, *Supreme Court Practice* 58 (5th ed. 1978).

While TWA was technically victorious in the court below, the court of appeals totally abrogated, albeit prospectively, the limitation of liability provisions of the Warsaw Convention upon which TWA's "victory" was based. Since the abrogation of those limits will substantially increase TWA's operating costs as well as those of virtually all international air carriers and air freight shippers alike, there can be absolutely no doubt that the court of appeals decision has severely and adversely affected TWA. Accordingly, a grant of certiorari is proper in this case.[5] Were this Court to consider review improper in this situation, it would preclude petitions for certiorari in a class of cases which may well be among the most appropriate for review—cases which announce such a substantial change in the law, and have such a broad impact, that the court below feels compelled to make its holding prospective only.

CONSTITUTIONAL PROVISIONS, TREATY INVOLVED

The constitutional and treaty provisions involved are Article II, Section 2, Clause 2 of the United States Constitution and Article 22 of the Warsaw Convention, which are set out at pages A-34 and A-35, respectively.

5. Indeed, in cases in which a court of appeals decision has adversely impacted non-parties, this Court has permitted intervention solely for the purpose of filing a petition for certiorari. *See, e.g., Banks v. Chicago Grain Trimmers*, 389 U.S. 813 (1967), 390 U.S. 459 (1968); *Hunter v. Ohio ex rel. Miller* 396 U.S. 879 (1967); *Rogers v. Paul*, 382 U.S. 198 (1965); *see also Mullaney v. Andersen*, 342 U.S. 415 (1952). Surely where an actual party to the action has suffered devastating consequences as a result of the decision of the court below, that party should not be barred from seeking Supreme Court review merely because the court of appeals chose to make its adverse ruling prospective in nature.

STATEMENT OF THE CASE

A. Introduction

This action arises out of the loss, during a TWA flight, of four packages of numismatic materials allegedly valued at $250,000. The facts are undisputed. The numismatic materials in question were delivered in unmarked packages by Franklin Mint to TWA for shipment by air from the United States to England. Franklin Mint made no special declaration of value at the time the packages were delivered to TWA.[6] The shipment never reached its destination.

B. The Warsaw Convention

The Warsaw Convention was signed at Warsaw, Poland in 1929, and adhered to by the United States in 1934.[7] Since the Convention "is by far the most widely adopted treaty concerning private international law and after the United Nations Charter one of the most widely adopted of all treaties" (A. Lowenfeld, *Aviation Law* § 4.1, at 7-98 (2d ed. 1981)), its significance to the aviation industry as well as its importance within the multilateral treaty system is beyond dispute.

The primary purposes of the Convention are: (i) "to establish a uniform body of world-wide liability rules to govern international

6. Franklin Mint was not required to accept the limits of liability contained in the Convention. Pursuant to Article 22 of the Convention, Franklin Mint had the right to make a special declaration of value and pay an additional charge for full coverage. It chose, however, not to do so. As an experienced shipper of air freight, Franklin Mint presumably decided to protect against the risk of loss through its own insurance.

7. There have been four subsequent modifications of the Warsaw Convention: (i) Hague Protocol of 1955; (ii) the Montreal Agreement of 1966, a private agreement among most international air carriers; (iii) the Guatemala City Protocol of 1971; and (iv) the Montreal Protocols of 1976. Although neither Hague Protocol nor the Guatemala City Protocol has been ratified by the United States, both Protocols have been looked to as indicia of the signatories' subsequent conduct for purposes of construing provisions of the Convention. *See, e.g., Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 36 n.15 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976). Obviously the signatories' most recent word on Article 22—the Montreal Protocols—is equally relevant in ascertaining their intent.

aviation, which would supersede . . . the scores of differing domestic laws" (*Reed v. Wiser*, 555 F.2d 1079, 1090 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977)); (ii) to limit the maximum extent of a carrier's potential liability for damages (*see* Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 499-500 (1967)); and (iii) to set a "reliable and consistent basis for recovery for injury or damage to persons or property" (J. Golden, Warsaw Convention Liability Limits (May 20, 1981) (unpublished memorandum by the Director of the Bureau of Compliance and Consumer Protection, Civil Aeronautics Board) [hereinafter cited as Golden Memorandum] (reprinted at A-86)).

In order to ensure that the Warsaw limits of liability would remain uniform and stable, the drafters of the Convention expressed the limitation in terms of the then existing international monetary unit of account, gold.[8] From the inception of the Convention until 1968, gold provided the stability and the uniformity which the drafters intended. Converting the Warsaw limitation into United States dollars involved no more than a simple mathematical computation employing the official rate of gold, which remained virtually stable throughout that period.

8. The gold unit chosen was the French gold franc (colloquially known as the Poincare franc), which was defined as consisting of 65-½ milligrams of gold of millesimal fineness nine hundred. Thus, the limit of liability was fixed at 250 French gold francs per kilogram of lost cargo (Article 22(2)), convertible into national currency in round figures (Article 22(4)). In this respect, the drafters intended the gold value provisions to be read as referring to a definite and stable unit of account, not to a precious metal. *See Serbian Loans Case*, 1929 P.C.I.J., ser. A, Nos. 20/21 (Judgment of July 12), *reported in* 2 *World Court Reports* 344-401 (M. Hudson ed. 1935), *discussed in* 5 G. Hackworth, *Digest of International Law* 630-35 (1943). That case, decided in the year Warsaw was signed, involved the interpretation of various international loan agreements providing for payment based upon the gold franc. In construing those agreements, the P.C.I.J. held: "[i]t is manifest that the Parties, in providing for gold payments, were referring, not to payment in gold coins, but to gold as [a] standard of value." *Serbian Loans Case*, 2 *World Court Reports* at 365.

However, for a variety of reasons arising from a changing world economy, the central banks of most States instituted procedures in 1968 which separated their official monetary gold transactions from non-governmental commercial gold dealings. This resulted in a "two-tier" period, lasting until April 1, 1978, during which the stable official price of gold existed side by side with a constantly fluctuating commodity price for gold which, with the passage of time, radically diverged from the official price.[9]

Notwithstanding the existence of both a market price and an official price for gold throughout the two-tier period, there was no difficulty converting the Article 22 limitation into United States currency. Pursuant to a series of Civil Aeronautics Board ("CAB") orders, and as reflected on all air carrier tariffs and tickets involving air transportation to or from the United States, the Warsaw gold provisions were converted into dollars at the official price of gold. The CAB consistently adhered to this position, and the presently effective CAB regulation, Order 74-1-16, dated January 3, 1974 (A-36), so provides.

In 1975, in an attempt to ameliorate the severe economic pressures resulting from instability in the market price of gold, the International Monetary Fund (the "IMF")[10] formulated a plan,

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9. "[B]y the mid-1970's, gold had become a volatile commodity, not related to a price index, or to the rate of inflation, or indeed to any meaningful economic measure, other than the views of whoever made up the market about all of the terrible things going on in the unpredictable world." A. Lowenfeld, *Aviation Law* § 6.51, at 7-169 (2d ed. 1981). As an illustration of the volatility of the market price of gold, its price fell from approximately $850 per ounce in January 1980 to approximately $490 per ounce on April 2 of that year and then rose again to approximately $700 per ounce in September 1980. During the twenty-four day period from January 5 to January 29, 1981, the market price of gold fell from approximately $600 to $493.75 per ounce. N.Y. Times, Jan. 30, 1981, at D1, col. 4.

10. The IMF was organized at the Bretton Woods Conference in 1944 to promote international monetary cooperation, to facilitate the growth of international trade, and to assist in the establishment of a multilateral system of payments for currency transactions among member States. The United States became a member of the IMF in 1945. *See* Bretton Woods Agreements Act, ch. 339, § 2, Pub. L. No. 79-171, 59 Stat. 512 (1945), *codified at* 22 U.S.C. § 286 (1976).

known as the Jamaica Accords, to replace the use of gold as an international monetary unit of account with Special Drawing Rights ("SDRs").[11]

C. The Montreal Protocols

The Warsaw signatories met at Montreal in 1975 to attempt "to deal with the changes in the role of gold in international monetary transactions." Golden Memorandum, *supra*, at A-90. Their solution, embodied in the Montreal Protocols, was the substitution of SDRs for gold francs as the Warsaw conversion factor. *Id.* at A-90. There were two reasons for this solution: (i) as a consequence of recent IMF actions, SDRs would soon replace gold as the stable international monetary unit of account used for international transactions; and (ii) the use of SDRs as the Warsaw conversion factor would effectuate the drafters' goal of a predictable and stable factor to express Warsaw's limits of liability.

During the meetings at Montreal, the United States "took the lead" in suggesting SDRs as the standard of conversion[12] and signed Protocols No. 3 and No. 4,[13] which adopt SDRs as the Warsaw unit of account. Those protocols, however, have not yet been ratified by the Senate.[14]

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11. The SDR is a stable international unit of account, valued on the basis of a basket of five national currencies, which does not have a competing use as a commodity. Thus, SDRs are insulated from free market speculation and other problems which led to instability in the price of gold and to the ultimate breakdown of gold as an international unit of account. Employed as a medium of exchange between governments, central banks, and the IMF, the "SDR has first claim to recognition as the unit of account to replace gold in universal international organizations." J. Gold, *SDRs, Currencies, and Gold*, IMF Pamphlet Series No. 33, at 96 (Washington, D.C. 1980). *See also* the decision below at A-15-16, 690 F.2d at 310.

12. *See* A. Lowenfeld, *Aviation Law* § 6.51, at 7-171 (2 ed. 1981); *see also* Fitzgerald, *The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing International Carriage by Air*, 42 J. Air L. & Com. 273, 325, 329-330 (1976).

13. Protocols No. 3 and No. 4 are *reprinted in* A. Lowenfeld, *Aviation Law* 985-1001 (2d ed. Supp. 1981).

14. On November 17, 1981, the Senate Committee on Foreign Relations reported 16 to 1 in favor of ratification of those Protocols. Senate Comm. on Foreign Relations, Montreal Aviation Protocols Nos. 3 and 4, S. Exec. Rep. No. 45, 97th Cong., 1st Sess. 5 (1981). Since the Protocols were not voted upon in 1982, they have been referred back to the Foreign Relations Committee.

D. The Decision of the Court Below

TWA argued in the courts below that the Warsaw gold provisions might be converted into United States currency by three alternative methods: (i) the last official price of gold in the United States; (ii) the SDR; and (iii) the exchange value of the modern French franc. Plaintiffs responded that the appropriate basis for conversion is the market price of gold.[15]

The district court concluded that the appropriate conversion factor is "the last official price of gold in the United States." A-27, 525 F. Supp. at 1289.

On appeal, the Second Circuit affirmed the decision of the district court but held that sixty days after the issuance of its mandate the Warsaw limitation of liability provisions would become unenforceable. The court of appeals reached that conclusion because:

> While the Convention has not been formally abrogated, enforcement by national judicial tribunals is impossible without their picking and choosing among alternative units of conversion according to their view of which is best as an initial policy matter. We have no power to select a new unit of account. We thus hold the Convention's limitation of liability unenforceable by United States Courts. (A-6, 690 F.2d at 306.)

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because this case raises the significant question of whether the courts of the United States may abrogate a provision of a treaty which is both constitutionally sound and capable of enforcement. In view of the fundamental principle that the Constitution reserves the power to abrogate treaties to the political branches of the government, it is respectfully submitted that the court of appeals incorrectly declared the

15. The court of appeals correctly held that basing Warsaw limits upon the market price of gold would constitute a "gross departure" from the Convention's purposes since gold's market rate "is simply the daily fluctuating price of a commodity, affected by conditions relating to supply and nonmonetary uses affecting demand" (A-15, 690 F.2d at 310).

limitation provisions of the Warsaw Convention to be prospectively "unenforceable in United States Courts." A-19, 690 F.2d at 311.

In addition, the Second Circuit erroneously failed to exercise its responsibility to construe the treaty in the light of changed circumstances so as to effectuate the intent of its drafters and adhering nations.

POINT I

THE COURT OF APPEALS WAS WITHOUT POWER TO DECLARE THE LIMITATION OF LIABILITY PROVISIONS OF THE WARSAW CONVENTION UNENFORCEABLE

In concluding that the limitation of liability provisions of the Warsaw Convention are unenforceable, the Second Circuit greatly exceeded its constitutional powers since it was effectively abrogating a treaty, an act which the Constitution reserves to the Executive and Legislative branches of the Government. U.S. Const., art. II, § 2, cl. 2. As this Court stated in *Doe ex dem. Clark v. Braden*, 57 U.S. (16 How.) 635, 657 (1854):

> The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms.

The rule of *Doe v. Braden*, to which this Court has consistently adhered (*see Whitney v. Robertson*, 124 U.S. 190, 194-95 (1888); *Terlinden v. Ames*, 184 U.S. 270 (1902)), is no less applicable because circumstances attendant to the original drafting of a treaty have changed.[16]

16. Courts have consistently held that a change in circumstances should not be permitted to defeat a treaty's original purpose. *See, e.g., Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976) ("For a court to view a treaty as frozen in the year of its creation is scarcely more justifiable than to regard the Constitutional clock as forever stopped in 1787."); *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804, 812 (2d Cir. 1966) (The language of a

(footnote continued on next page)

Thus, by abrogating a treaty, whose constitutionality it did not question[17] and which is clearly capable of being construed so as to be effective, the Second Circuit ignored the rule of *Doe v. Braden* and unduly infringed upon the foreign relations power of the United States which the Constitution entrusts to coordinate branches of the government. If the Second Circuit's decision is allowed to stand, courts would be empowered to abrogate any of the myriad of treaties to which the United States is a party, a situation which could severely impact the foreign relations interests of the United States. It is for precisely such reasons that "a court will not ordinarily inquire whether a treaty has been terminated, since on that question 'governmental action . . . must be regarded as of controlling importance.'" *Baker v. Carr*, 369 U.S. 186, 212 (1962). *See also Terlinden v. Ames*, 184 U.S. 270 (1902).

(footnote continued from previous page)

treaty "should never become a 'verbal prison'"). Thus, gold's metamorphosis from an international unit of account into a mere commodity does not render the Convention unenforceable or preclude the judiciary from fulfilling its obligation to construe this treaty in accordance with the expectations of the contracting states. *See, e.g., Nielsen v. Johnson*, 279 U.S. 47, 51-52 (1929) ("Treaties are to be liberally construed so as to effect the apparent intention of the parties.").

17. Although the Second Circuit found the Warsaw limitation provisions unenforceable, it did not question the constitutionality of those provisions. However, in a decision rendered barely a month before the Second Circuit's opinion in *Franklin Mint*, the Ninth Circuit questioned the constitutionality of the Warsaw Convention's limitations of liability provisions. *See In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301 (9th Cir. 1982) [hereinafter cited as *Bali*]. The *Bali* court indicated in dicta that the Warsaw limitation of liability provisions might infringe plaintiffs' rights to due process as well as their right to freedom of travel, unless another remedy were available to provide them with full compensation. The Ninth Circuit then concluded that such a remedy is available under the Tucker Act, 28 U.S.C. § 1491, "if the liability limitation constitutes a 'taking' under the fifth amendment." *Bali*, 684 F.2d at 1310. However, the court of appeals did not decide that question since "[t]he question is properly one for the Court of Claims, when and if the Warsaw Convention limitation is applied to [the *Bali*] plaintiffs." *Id.* at 1312.

Indeed, it is submitted that the apparent conflict surrounding the constitutionality of the Warsaw Convention when coupled with the importance of the issue to the public and the aviation industry is a sufficient ground in and of itself for a grant of certiorari. *See, e.g., John Hancock Mutual Life Insurance Co. v. Bartels*, 308 U.S. 180, 181 (1939).

Indeed, the consequences which may flow from the abrogation of a treaty may be so severe that any attempt to abrogate a treaty, even by a branch of the government having the power to do so, must be totally unequivocal. While Congress has the power to abrogate or modify a treaty, the intention to do so must be clearly expressed; it will not be lightly imputed. *See Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 690 (1979); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-13 (1968); *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934); *United States v. Lee Yen Tai*, 185 U.S. 213, 221-22 (1902); *Cook v. United States*, 228 U.S. 102, 120 (1933).

Significantly, in abrogating Article 22 of the Convention, the Second Circuit considered the foregoing factors in only a single paradoxical paragraph and an even more paradoxical footnote (A-17-18, 690 F.2d at 311 & n.26). Thus, the court of appeals noted that treaty negotiation, proposal and ratification are the exclusive province of other branches of the government; that the United States courts must observe the line between treaty interpretation and treaty negotiation, proposal and ratification; and that it is not the province of the courts to declare treaties abrogated. *Id.* Having set forth these undeniable conclusions, the Second Circuit then proceeded to declare that the treaty is unenforceable in its present form and that the proper unit of conversion may only be selected by the parties to the treaty rather than arrived at through construction by the courts.[18]

In short, the Second Circuit has taken the applicable principles "through the looking glass." In a supposed attempt to avoid offending other branches of the government or the Convention's signatories, by judicially selecting a unit of conversion for the Convention's cargo limitation provisions, the Second Circuit abrogated those provisions in their entirety. However, the

18. As discussed in Point II below, the Second Circuit failed to fulfill its duty to construe the Warsaw limitation provisions in accordance with the intent of the framers and the subsequent conduct of the adhering nations.

United States has given every indication via the Montreal Protocols that it continues to support a limitation,[19] and every other signatory nation which has faced this issue, either through its courts or by legislation, has had no difficulty in selecting a conversion factor and has found that selection to be far preferable to allowing the Warsaw liability limits to lapse.[20]

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19. *See* discussion at page 7 above. Furthermore, it is equally apparent that the prospective abrogation of the Convention's limitation provisions contravenes Article 18 of the Vienna Convention on the Law of Treaties, *reprinted in* 8 I.L.M. 679, 686 (1969). Under that Article, the fact that the United States has signed the Montreal Protocols places it under an obligation to avoid undermining them during the ratification process. *See generally United States v. D'Auterive*, 51 U.S. 609, 623 (1850).

Thus, the Second Circuit's abrogation of Article 22 (by refusing to enforce any limitation) is completely at odds with the limits set forth in the Montreal Protocols and the obligation of the United States to refrain from acts, during the ratification process, which are inconsistent with the terms of a treaty it has signed. In contrast, continued use of the last official price of gold or adoption of the SDR as the Warsaw conversion factor would be fully consistent with the Vienna Convention since employing either conversion factor achieves the predictable and stable limits of liability as well as the approximate level of limitation sought by the Montreal Protocols.

Although the Vienna Convention has not been ratified by the United States, it is "generally recognized as the authoritative guide to current treaty law and practice" (Letter from Secretary of State William P. Rogers to the President (October 18, 1971) (transmitting the Vienna Convention) (S. Exec. Doc. L. 92nd Cong., 1st Sess.)). As such, it has been relied upon by United States courts. *See, e.g., Weinberger v. Rossi*, 50 U.S.L.W. 4354, 4355 n.5 (U.S. March 31,1982); *Greater Tampa Chamber of Commerce v. Goldschmidt*, 627 F.2d 258, 263 n.4 (D.C. Cir. 1980); *Husserl v. Swiss Air Transport Co.*, 351 F. Supp. 702, 707 (S.D.N.Y. 1972), *aff'd per curiam*, 485 F.2d 1240 (2d Cir. 1973).

20. Nor, contrary to the court of appeals conclusion, is there "international disarray" with respect to the conversion issue (A-14, 690 F.2d at 309) since the record unequivocally demonstrates that no other signatory state has rejected the Convention's limitation on liability. And, as noted in *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979), decisions of "our sister signatories [are] entitled to considerable weight." Thus, notwithstanding the conversion factor employed, it is apparent that the Second Circuit failed to perceive the crucial factor that *some* limitation must be enforced in order to fulfill the expectations of the Convention's signatories.

Moreover, the ease with which the Convention may be enforced is illustrated by the fact that no other United States court which has had occasion to consider the question, either before or after the Second Circuit's decision, has found any difficulty in concluding that the primary purpose of the treaty is to employ some limitation and that the selection of a conversion factor is an entirely appropriate aspect of treaty construction. *See Franklin Mint Corp. v. Trans World Airlines, Inc.*, 525 F. Supp. 1288 (S.D.N.Y. 1981) (holding the last official price of gold to be the appropriate Warsaw conversion factor); *In re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, 535 F. Supp. 833 (E.D.N.Y. 1982) (applying the last official price of gold) [hereinafter cited as *Polish Case*];[21] *Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 531 F. Supp. 344 (S.D. Tex. 1981);[22] *Electronic Memories & Magnetics Corp. v. The Flying Tiger Line, Inc.*, Index No. 784512 (Cal. Super. Ct., San Francisco Aug. 25, 1982) (applying the last official price of gold) (reprinted at A-60); and *Deere & Co. v. Deutsche Lufthansa AG*, Index No. 81 C 4726 (N.D. Ill. Dec. 30, 1982) (applying the last official price of gold) (reprinted at A-61).

Indeed, the *Deere* court employed the last official price of gold as the conversion factor, on the theory that a constitutional treaty capable of enforcement must be enforced, even in the face of the Second Circuit's decision in *Franklin Mint*. Unfortunately, the district courts sitting in the Second Circuit, the primary situs for Warsaw Convention cases because virtually all international airlines are subject to personal jurisdiction in New York City, do not have the luxury of ignoring the Second Circuit's *Franklin Mint* decision. Thus, an incipient conflict has already arisen.

In sum, this case raises the substantial constitutional question of whether a United States court may abrogate a treaty provision

21. The *Polish Case* is presently on an interlocutory appeal to the United States Court of Appeals for the Second Circuit on an unrelated issue—the print size of the Warsaw notice on airline tickets.

22. *Boehringer* is presently on appeal to the United States Court of Appeals for the Fifth Circuit. It held the market price of gold to be the appropriate conversion factor, a result rejected in the *Polish Case*, by the *Deere* court, and by the Second Circuit in *Franklin Mint*.

which is constitutionally sound, is capable of being enforced, and is actually supported by numerous signatory states, merely because a change in circumstances requires the court to construe certain of its terms. It is submitted that this question is of major importance and has not been directly addressed by this Court. In view of the rather ancient vintage of this Court's prior decisions with respect to a court's power to abrogate a treaty, if the decision of the court below is permitted to stand without comment, it may be expected to lead to substantial uncertainty in the lower courts outside the Second Circuit and to a body of case law within the Second Circuit which is totally at odds with this Court's prior decisions concerning the principles to be applied to treaty construction. Since such a scenario points to the clear possibility that the Constitutional wall between the coordinate branches of the government will be eroded with respect to the power to abrogate treaties, this Court should review and modify the decision below.

POINT II

THE COURT OF APPEALS ERRONEOUSLY FAILED TO EXERCISE ITS CONSTITUTIONAL RESPONSIBILITY TO CONSTRUE THE WARSAW CONVENTION

In sharp contrast to its implicit conclusion that it was empowered to nullify a provision of a treaty adhered to by the United States, the court of appeals determined that it lacked authority to interpret the treaty[23] by selecting a unit of conversion on the ground that the "[s]ubstitution of a new term is a political question, unfit for judicial resolution." A-19, 690 F.2d at 311. The court of appeals reached this conclusion after rejecting TWA's argument that at least two alternative conversion factors—the last official price of gold or the SDR—are viable since employing

23. TWA submits that, far from lacking authority, the Second Circuit had an affirmative duty to interpret the treaty in order to effectuate the intent of the contracting parties. *See, e.g., Nielsen v. Johnson, 279 U.S. 47, 51-52 (1929); Jordan v. Tashiro,* 278 U.S. 123, 127 (1928); *Tucker v. Alexandroff,* 183 U.S. 424, 437 (1902); *Geofroy v. Riggs,* 133 U.S. 258, 271 (1890).

either unit results in a stable and predictable limit of liability which fully conforms to the purposes envisioned by the framers of the Convention as well as the subsequent conduct of the parties to the treaty.

A. The Last Official Price of Gold Is a Viable Conversion Factor

The district court held that the appropriate unit of conversion for determining Warsaw limits of liability is "the last official price of gold in the United States." A-27, 525 F. Supp. at 1289. That conclusion was based upon the following factors:[24]

> (i) employing the last official price of gold as a conversion factor completely effectuates the objectives of the Warsaw signatories—to fix predictable, stable and definite limits of liability for air carriers;
>
> (ii) the only currently effective CAB Order dealing with the conversion issue, Order 74-1-16, employs the last official price of gold as the Article 22 conversion factor and specifically requires all United States air carriers to use that price in setting forth the dollar value of the Warsaw limitation on their tickets; and
>
> (iii) the entire aviation industry has consistently conformed its conduct to Order 74-1-16; and, in light of that uniform practice, both shippers and carriers alike, including the parties hereto, adopt the last official price of gold as the Warsaw conversion factor in their contracts of carriage.

In addition to its application by the district court in this case, other courts, both before and after the Second Circuit's decision, have applied the last official price of gold as the conversion factor. *See, In re Air Crash Disaster at Warsaw, Poland on March 14,*

24. In lieu of setting forth its reasons in detail, the district court adopted TWA's arguments "to the extent that they support" its holding that the last official price of gold is the proper conversion factor (A-27, 525 F. Supp. at 1289).

1980, 535 F. Supp. 833 (E.D.N.Y. 1982); *Electronic Memories & Magnetics Corp. v. The Flying Tiger Line, Inc.*, Index No. 784512 (Cal. Super. Ct., San Francisco Aug. 25, 1982) (reprinted at A-60); and *Deere & Co. v. Deutsche Lufthansa AG*, Index No. 81 C 4726 (N.D. Ill. Dec. 30, 1982) (reprinted at A-61). In *Deere*, the court referred to the Second Circuit's decision in *Franklin Mint* and stated: "The [method of converting] which seems most nearly to effectuate the intention of the treaty to *limit* the liability of air carriers is to employ the last official United States Price of gold." A-63 (emphasis in original).

Although the Second Circuit concurred with the district court's finding that the Warsaw signatories intended to fix uniform and stable limits of liability, it rejected the use of the last official price of gold, notwithstanding the fact that the use of that conversion factor would effectuate the purposes of the Convention. In making this determination, the court of appeals placed primary reliance upon the repeal in 1976 of Section 2 of the Par Value Modification Act, 31 U.S.C. § 449 (1976) (the "Par Value Act"),[25] which required the Secretary of the Treasury to set a par value of the dollar in terms of gold. Based upon that repeal, the court of appeals concluded that "Congress . . . abandoned the unit of conversion specified by the Convention and did not substitute a new one" (A-19, 690 F.2d at 311); that the CAB Order upon which the district court relied had in effect lost its vitality; and that it could properly ignore the CAB's most recent policy determination that "the last official price is the best available standard."[26]

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25. Section 2 of the Par Value Act was repealed by Section 7 of the Bretton Woods Agreements Act, Pub. L. No. 94-564, 90 Stat. 2660 (1976) (the "1976 Act"), whose purpose was to amend financial legislation to reflect amendments to the IMF Articles of Agreement. The Senate commented upon the limited purpose of Section 7 by calling it a "technical amendment" whose purpose was to "delete language that is inconsistent with the new [IMF] Articles." S. Rep. No. 94-1148, 94th Cong., 2d Sess. 8, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5935, 5943.

26. The most recent CAB staff memorandum to consider the conversion question, the Golden Memorandum, *supra*, at A-86, recommends that "the Board should take no action which would disturb the

(footnote continued on next page)

However, far from reflecting a clear congressional intent to abandon the use of the last official price of gold as a medium of conversion under the Warsaw Convention, neither the 1976 Act itself nor the legislative history of that Act contains any reference to the Warsaw Convention.[27] Indeed, the Second Circuit commented that "Congress may not have focused explicitly upon the Convention in repealing [the Par Value] Act." A-18, 690 F.2d at 311. As a result, the Second Circuit's inference that Congress intended to abandon the Convention's unit of conversion is in direct contravention to this Court's admonition that "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress" (*Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934)), "but must appear clearly and distinctly from the words used in the statute" (*United States v. Lee Yen Tai*, 185 U.S. 213, 221 (1902)).

Moreover, as the CAB is the administrative agency charged with the regulation of the United States airline industry, its

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(footnote continued from previous page)

conversion formula now contained in [Order 74-1-16] of the regulations." *Id.* at A-92. Furthermore, the CAB is continuing to endorse the continued use of the last official price of gold as a conversion factor. All United States air carriers are required to file their international tariffs with the CAB, *see* Federal Aviation Act of 1958, § 403, 49 U.S.C. § 1373 (1976), and they have continued to file using the last official price of gold. The CAB has ordered this procedure, has not modified that Order, and has not objected to the carriers' filings.

27. If anything, the legislative history of the repeal statute contemplates a continued role for gold, particularly in the international sphere, during the transition to SDRs as the unit of account. Thus, the Senate Committee on Foreign Relations noted: "While it is the expressed intent of the IMF to move gold out of the international monetary system, there are vast numbers of legal and psychological mechanisms still in evidence in the system that will perpetuate some role for gold." S. Rep. No. 94-1148, *supra*, at 5947.

orders and regulations are entitled to deference from the judiciary,[28] particularly with respect to the enforcement of existing treaty provisions.[29] The court of appeals improperly ignored the CAB's policy determination to employ the last official price of gold as the unit of conversion.

B. Special Drawing Rights Are a Viable Alternative Conversion Factor

Although the district court found the last official price of gold to be the most appropriate conversion factor for the Warsaw Convention's limitation of liability provisions, it noted that were it "writing on a clean slate" (A-27, 525 F. Supp. at 1289), it would have found TWA's arguments in favor of employing SDRs to be "most persuasive" (*id.*).

As stated above, SDRs are a stable international unit of account and indeed "have become the cornerstone of the new international system of finance." P. Samuelson, *Economics* 612 (11th ed. 1980); *see* Sir Joseph Gold, *Gold in International Monetary Law: Change, Uncertainty, and Ambiguity*, 15 J. Int'l L. & Econ. 323 (1981). Thus, their use as a medium of conversion would fully comply with the intent of the framers of the Convention since they would result in predictable and stable limits of liability.[30]

In rejecting SDRs the Second Circuit clearly demonstrated a misunderstanding of their role as a conversion factor. TWA did

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28. *See, e.g., Udall v. Tallman*, 380 U.S. 1 (1965); *Malrite T.V. of New York v. FCC*, 652 F.2d 1140, 1149 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). An agency regulation must be affirmed unless it is arbitrary, capricious, or an abuse of discretion (*see* Administrative Procedure Act § 10(e), 5 U.S.C. § 706(2) (A)); and "a reviewing court . . . 'is not empowered to substitute its judgment for that of the agency'." (*FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 n. 30 (1981)).

29. *See Sumitomo Shoji America, Inc. v. Avagliano*, 102 S. Ct. 2374, 2379-80 (1982); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961). *See also Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

30. SDRs have been adopted as the basis for converting Warsaw gold francs into national currencies by legislation or administrative acts in several foreign countries including the Federal Republic of Germany, Ireland, Norway, Sweden, and the United Kingdom. *See* Stephen A. Silard, A Comment on *Franklin Mint v. TWA* (Dec. 7, 1982) (unpublished manuscript presented to the Transportation Law Committee of the Federal Bar Association, Washington, D.C.).

not suggest that the court of appeals "set the [treaty] level of the limitation" (A-17, 690 F.2d at 310) either by selecting the number of SDRs which, in the Court's view, would result in an appropriate limitation of liability, or by adopting the number of SDRs employed in the as yet unratified Montreal Protocols. Rather, TWA pointed out that SDRs, as the present-day international unit of account, may be used to convert the original Warsaw limit of liability provisions, as expressed in gold francs, into dollars, in total compliance with the intent of the drafters and without any "legislative selection" on the part of the courts.[31]

The ease with which SDRs are employed as a conversion factor is demonstrated by the widely accepted international method for converting Warsaw gold francs to local currency, which is as follows:[32]

> (1) On March 31, 1978, SDRs were an international unit of account with a gold value, and on that date Warsaw gold francs were easily convertible into SDRs.

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31. Indeed, Second Circuit's rejection of SDRs because they are "a creature of an international body, the IMF" (A-17, 690 F.2d at 310), and because their value can change "at the whim of an international body distinct from the parties to the Convention" (A-17, 690 F.2d at 311) is demonstrative of a particularly narrow view. This view is rather surprising since the United States has ratified the multilateral treaty creating the IMF and has taken the lead in suggesting the adoption of SDRs as the Montreal Protocols' unit of conversion. Moreover, the Second Circuit overlooked the fact that a "seventy percent majority of the total voting power" of the 146 member nations is necessary to change the valuation of the SDR and an eighty-five percent majority is necessary to make a fundamental change in valuation. Art. XV, § 2 of the IMF's Articles of Agreement. Even non-members of the IMF, including Switzerland, agree that the SDR should be used as the best monetary unit of account to express limitations of liability in treaties.

32. *See The Netherlands v. Giants Shipping Corp.*, Rechtspraak van de Week 321 (May 30, 1981) (Sup. Ct. of The Netherlands May 1, 1981), discussed *infra*. The United Kingdom has adopted SDRs as the unit of account for purposes of converting the gold value clause of the Convention into sterling. Pursuant to Statutory Instrument 1980 No. 281, the gold franc is converted into SDRs using the gold value of an SDR in effect on April 1, 1978. SDRs are then converted to sterling at the current SDR/sterling rate. Other nations which convert Warsaw gold francs through the use of SDRs are listed *supra* note 30.

(2) On April 1, 1978, the IMF member nations, including the United States, severed the link between gold and the SDR as well as between gold and their national currencies. The value of SDRs was measured according to the value of a weighted basket of currencies;[33] and national currencies were convertible into SDRs.

(3) On one day, April 1, 1978, the basket value of the SDR was precisely the same as its gold value had been the day before. As a result, it is possible to convert Warsaw gold francs into SDRs.[34]

(4) Therefore, the SDR performs the function of a Rosetta stone and can translate original Warsaw gold francs into current U.S. dollars, since there is an unbroken line of value between gold, SDRs, and national currencies.

This is precisely the method used by the Supreme Court of the Netherlands in a case involving a conversion issue virtually identical to this one. *The Netherlands v. Giants Shipping Corp.*, Rechtspraak van de Week 321 (May 30, 1981) (Sup. Ct. of

33. *See supra* note 11.

34. The mathematical computation converting French gold francs into U.S. dollars would be as follows. The value of the SDR on March 23, 1979, the date the cargo was delivered to TWA, has been used for *illustrative* purposes.

1 Poincare franc (90% fine gold)		= 0.0655 gram of fine gold
1 Poincare franc (100% fine gold)		= 0.05895 gram of fine gold
1 SDR (gold value on March 31, 1978)		= 0.888671 gram of fine gold
The number of francs in one SDR	= $\frac{0.888671}{0.05895}$	= 15.075 rounded to 15
The Warsaw limit of 250 francs per kilogram converted to SDRs	= $\frac{250}{15}$	= 16.67 SDRs per kilogram, rounded to 17 SDRs
Dollar value of 1 SDR on March 23, 1979		= 1.28626
17 SDRs per kilogram times 1.28626		= $21.87 per kilogram.

The Netherlands May 1, 1981) (reprinted in English at A-65).[35] The *Giants Shipping* case is the only decision on point rendered by the highest court of any Warsaw signatory. And since uniformity of international law is a primary purpose of the Convention, this Court should give great weight to the interpretation of the highest courts of other adherents. *See Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138 (1934), where this Court looked to the interpretation of a treaty given by the Supreme Court of Canada.[36]

Finally, the use of SDRs as a unit of conversion is totally consistent with fundamental tenets of treaty construction. It has been uniformly held that treaties are to be interpreted liberally: (i) to effectuate the intent of the drafters;[37] (ii) in light of

35. In *Giants Shipping*, the Dutch court calculated that fifteen gold Poincare francs had the equivalent gold weight of one SDR on April 1, 1978. It was then a simple matter to convert from SDRs to Dutch currency for any given day by merely looking at a financial publication similar to The Wall Street Journal. The *Giants Shipping* court construed a limitation of liability provision set forth in the Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships (Brussels, 1957) (the "Brussels Convention"). The Brussels Convention is strikingly similar to the Warsaw Convention in many respects, including the fact that the limitation of liability provisions in both are expressed in French Poincare gold francs.

36. *See also Block v. Compagnie Nationale Air France*, 386 F.2d 323, 337-38 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968) ("A multilateral treaty is rather like a "uniform law" within the United States. The Court has an obligation to keep interpretation as uniform as possible."); *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979) ("We do find the opinions of our sister signatories to be entitled to considerable weight.").

37. *See, e.g., Nielsen v. Johnson*, 279 U.S. 47, 51-52 (1929) ("Treaties are to be liberally construed so as to effect the apparent intention of the parties."); *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804, 812 (2d Cir. 1966); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976).

changed circumstances;[38] and (iii) in accordance with the subsequent conduct of the parties.[39]

In sum, gold no longer performs the function of an international unit of account. That function is now performed by SDRs. Because the SDR's gold value on March 31, 1978 was the same as its new basket of currencies value on April 1, 1978, there is an unbroken line of value which a court should use to effectuate the intent of the parties to the treaty and convert the Warsaw gold francs into U.S. dollars. The Second Circuit failed to effectuate the framers' intent. Instead, it abrogated a major provision of the treaty.

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38. *See Missouri v. Holland*, 252 U.S. 416, 433 (1920) (In the words of Mr. Justice Holmes concerning Constitutional construction, which are equally applicable to treaty interpretation: "[W]hen we are dealing with words that also are a constituent act . . . we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters."); *Day*, 528 F.2d at 35; *Eck*, 360 F.2d at 812 (The language of a treaty should not become a "verbal prison." A change in circumstances may not be permitted to defeat a treaty's original purposes "even if this requires departing in some measure from the letter [of the treaty provision] and reading the language in a practical rather than literal fashion.").

39. *Pigeon River Improvement, Slide & Boom Co. v. Cox*, 291 U.S. 138, 158-63 (1934); *Day*, 528 F.2d at 35 ("The conduct of the parties subsequent to ratification of a treaty may, thus, be relevant in ascertaining the proper construction to accord the treaty's various provisions."). In this case, the subsequent conduct of the parties would support the use of the last official price of gold or SDRs as conversion factors. When the Warsaw parties met in 1971 and drafted the Guatemala City Protocol (the terms of which were later incorporated into the Montreal Protocols), they discussed limits of liability based on the official price of gold. In 1974, the Legal Committee of the International Civil Aviation Organization ("ICAO"), an affiliate of the United Nations, supported the use of the official price of gold, condemning the use of the free market price. Legal Committee, 21st Sess., Minutes 84, ICAO Doc. 9131-LC/173-1, Resolution Concerning the Conversion of Poincare Francs to National Currencies in the Warsaw and Rome Conventions, at 2 (1974). And finally, in 1975 the drafters of the Montreal Protocols chose a limit of liability for cargo which had the same value as the Warsaw limit converted according to the official price of gold. The Montreal Protocols limit of 17 SDRs per kilogram is worth approximately $20 per kilogram. The Warsaw limit of 250 gold francs per kilogram, converted into dollars according to the last official price of gold, is $20 per kilogram. *See* CAB Order 74-1-16, at A-38.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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